

SENATE RECORD VOTE ANALYSIS

106th Congress
1st Session

Vote No. 161

June 10, 1999, 11:43 a.m.
Page S-6830 Temp. Record

Y2K LAWSUIT ABUSE PROTECTIONS/Tort Actions for Economic Losses

SUBJECT: Y2K Act . . . S. 96. Edwards amendment No. 619 to the McCain substitute amendment No. 608.

ACTION: AMENDMENT REJECTED, 41-57

SYNOPSIS: As reported, S. 96, the Y2K Act, will enact numerous reforms to protect companies from abusive litigation related to year 2000 (Y2K) computer date change problems. Without passage of this reform bill, litigation costs could reach \$1 trillion (12 percent of the entire United States' economy), potentially crippling the competitiveness of the United States' high technology industry and raising costs for consumers and for all businesses that use computers and automated systems.

The McCain substitute amendment would make additional compromise changes (see vote No. 120 for a description of the first set of compromise changes), including that it would eliminate the director and officer liability caps, it would eliminate punitive damages caps for businesses with more than 50 employees, it would provide that State evidentiary standards would be used in specific situations, and it would preserve the protections provided in the Year 2000 Information and Readiness Disclosure Act.

The Edwards amendment would permit a party to a Y2K action to make a tort claim for "economic losses" under Federal and State law as such law was in effect on January 1, 1999. (The Federal Government, by case law, and most States, by statute and by case law, generally do not permit economic losses in tort cases except for direct physical injury (bodily or material injury). Other claims for economic losses, such as for lost business due to a product's failure, are handled under contract law. A "tort" is a non-contractual harm. This division for economic losses between contract suits and tort suits started to erode in recent years, but, for the most part, the courts and legislatures have now repaired that erosion. Only a handful of States have yet to restore a strict division. The underlying McCain amendment would apply this current separation for economic losses, which is enforced nationally and in most States, to all States for Y2K actions. The Edwards amendment would allow those few States that currently permit the "tortification" of economic losses to continue that practice for Y2K suits.)

Those favoring the amendment contended:

(See other side)

YEAS (41)			NAYS (57)			NOT VOTING (2)	
Republicans (3 or 6%)	Democrats (38 or 86%)		Republicans (51 or 94%)	Democrats (6 or 14%)		Republicans (1)	Democrats (1)
Shelby	Akaka	Johnson	Abraham	Hatch	Dodd	Stevens ⁻²	Inouye ⁻²
Specter	Baucus	Kennedy	Allard	Helms	Feinstein		
Thompson	Bayh	Kerrey	Ashcroft	Hutchinson	Lieberman		
	Biden	Kerry	Bennett	Hutchison	Lincoln		
	Bingaman	Kohl	Bond	Inhofe	Moynihan		
	Boxer	Landrieu	Brownback	Jeffords	Wyden		
	Breaux	Lautenberg	Bunning	Kyl			
	Bryan	Leahy	Burns	Lott			
	Byrd	Levin	Campbell	Lugar			
	Cleland	Mikulski	Chafee	Mack			
	Conrad	Murray	Cochran	McCain			
	Daschle	Reed	Collins	McConnell			
	Dorgan	Reid	Coverdell	Murkowski			
	Durbin	Robb	Craig	Nickles			
	Edwards	Rockefeller	Crapo	Roberts			
	Feingold	Sarbanes	DeWine	Roth			
	Graham	Schumer	Domenici	Santorum			
	Harkin	Torricelli	Enzi	Sessions			
	Hollings	Wellstone	Fitzgerald	Smith, Bob			
			Frist	Smith, Gordon			
			Gorton	Snowe			
			Gramm	Thomas			
			Grams	Thurmond			
			Grassley	Voinovich			
			Gregg	Warner			
			Hagel				

EXPLANATION OF ABSENCE:

- 1—Official Business
- 2—Necessarily Absent
- 3—Illness
- 4—Other

SYMBOLS:

- AY—Announced Yea
- AN—Announced Nay
- PY—Paired Yea
- PN—Paired Nay

This amendment is very narrowly tailored to provide some degree of protection to consumers and small businessmen. Suppose, for instance, a grocer in a small town bought a computer system to handle all of his records and transactions. That grocer would typically have bought that computer without any type of contract specifying his right to recovery for lost business if the computer failed. Suppose also that he bought that computer on the direct, fraudulent misrepresentation of the computer salesman that the system was Y2K compliant. Under this bill, if that system then had a Y2K failure and that grocer's business went bankrupt because all of his records, orders, and bills were lost, he would only be entitled to recover the cost of fixing the computer. We do not believe that is just. Therefore, we have offered the Edwards amendment. It would allow that grocer to file a tort claim to get full recovery for the loss of his business. However, it would only allow that claim to be filed to the extent already permitted under Federal or State law. In reality, in most instances, that restriction would bar tort recovery. This amendment is very narrowly drawn to provide at least some relief. We urge our colleagues to support it.

Those opposing the amendment contended:

The Edwards amendment would effectively discard this bill's adoption of the national rule on economic losses, which preserves the separation between tort cases and contract cases. In lieu thereof, it would allow tort suits to be filed for all economic losses that may currently be sought under existing State legislation and case law. Most States do not permit such suits for indirect losses, such as lost income, that are handled under contract law; a few do. If this amendment were to pass, rapacious trial lawyers would go to those few States to file massive-class action lawsuits for unlimited damages against computer manufacturers. This amendment would get rid of the uniform treatment in every State of the national Y2K problem, and, in lieu thereof, it would open up a floodgate of litigation that could destroy the high-tech industry in America.

The controlling case at the Federal level, which was decided unanimously, is *East River S.S. Corporation v. Transamerica Delaval, Inc.* In that case, a company that chartered several steamships sued the manufacturer of the ship's turbine engines in tort for purely economic losses, including lost profits. The Supreme Court denied recovery in tort based in large part on the propriety of contract law over tort law in cases involving only economic loss: "When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong . . . Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements. The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies. In exchange, the purchaser pays less for the product . . . Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product. In this case, for example, if the charterers--already one step removed from the transaction (which included the shipbuilder in between)--were permitted to recover their economic losses, then the companies that subchartered the ships might claim their economic losses from delays, and the charterers' customers also might claim their economic losses, and so on." That Supreme Court decision has been adopted by most States, in case law and/or legislatively.

The Supreme Court's decision follows simple common sense. If it did not insist on this separation between contract law and torts, there would be no useful purpose in ever writing a contract. Someone could simply charge "fraud" instead of breach of contract, and could then file a tort demand for huge economic loss damages and penalties that were barred under the terms of the contract. Manufacturers of all products would have to assume their liability was virtually unlimited for everything they made, and would have to raise their prices accordingly, assuming they were able to stay in business at all.

Our colleagues have suggested that enforcing this uniform standard will end up protecting manufacturers who commit real fraud, such as lying about whether a product is Y2K compliant, as opposed to failing to abide by the terms of a contract. We disagree. We note, first, that intentional fraud is illegal and actionable as a tort; only the types of damages sought are different. Second, we note that States have adopted consumer protection statutes that also would serve as a basis for bringing a tort suit against a manufacturer.

If the Edwards amendment were adopted, it would make all existing contracts that limited liability, including express or implied warranties, meaningless, because plaintiffs could get around them by filing tort suits in those few States that allowed such suits. Unlimited economic damages of the type noted above by the Supreme Court could be sought, no matter what those contracts may have contained. Thus, under this amendment, the high-technology industry could be destroyed by lawsuits in the few States that have not acted to protect contract law from tortification. We strongly oppose allowing that abuse of the legal system, so we strongly oppose this amendment.